

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ADRIANA VELAZQUEZ	:	ORDER
for Revision of Determination or for Refund of Sales	:	DTA NO. 830940
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods December 1, 2016 through	:	
February 28, 2017 and December 1, 2017 through	:	
February 28, 2018.	:	

Petitioner, Adriana Velazquez, filed a petition for revision of determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the periods December 1, 2016 through February 28, 2017, and December 1, 2017 through February 28, 2018.

On September 15, 2022, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to Tax Law § 2006 (4) upon the basis that the petition was not timely filed with the Division of Tax Appeals. After being granted an extension of time to respond, the Division of Taxation, by Amanda Hiller, Esq. (Laura Krzeminski, Esq., of counsel), submitted a response and petitioner, by Hodgson Russ, LLP (Ariele R. Doolittle, Esq., of counsel), submitted a response by the due date, December 1, 2022. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this order commenced on March 1, 2023.

After due consideration of the documents and arguments presented, Nicholas A. Behuniak, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

1. On April 12, 2022, petitioner, Adriana Velazquez, filed a petition with the Division of Tax Appeals challenging a notice of determination, notice number L-050719755, dated October 15, 2019 (notice), issued by the Division of Taxation (Division) for the periods December 1, 2016 through February 28, 2017 and December 1, 2017 through February 28, 2018. The notice asserted that petitioner was a responsible person for sales and use taxes of Hariwo, Corp.

2. Over the years, petitioner filed five separate New York State tax preparer and facilitator enrollment forms with the Division. The tax preparer and facilitator enrollment forms were dated September 17, 2015, October 2, 2015, October 20, 2015, December 11, 2017, and December 13, 2017, respectively. All five of the tax preparer and facilitator enrollment forms filed by petitioner indicate her home address as on Flower Fields Lane, Orlando, Florida, and her mailing address at Commodity Cir Ste 4, Orlando, Florida.

3. The notice is addressed to petitioner at her Commodity Cir Ste 4, Orlando, Florida, mailing address.

4. On December 12, 2020, petitioner filed a request with the Division's Bureau of Conciliation and Mediation Services (BCMS) seeking a conciliation conference (BCMS conference request). The BCMS conference request protests a notice dated November 4, 2020. Attached to the BCMS conference request was a copy of a tax warrant, ID number E-050719755-W0001-7, issued by the Division and dated November 4, 2020 (tax warrant). The tax warrant was addressed to petitioner at her Flower Fields Lane, Orlando, Florida, home

address. The tax warrant indicates that it relates to the notice. A copy of the notice was not attached to petitioner's BCMS conference request. On the BCMS conference request, petitioner provided her Flower Fields Lane, Orlando, Florida, home address as her then current address.

5. On January 29, 2021, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. BCMS determined that petitioner's protest of the tax warrant was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on October 15, 2019, but the request was not received until December 21, 2020, or in excess of 90 days, the request is late filed.”

6. In the petition, petitioner, in addition to assertions regarding the appropriateness of the Division's conclusion that she was a responsible person for Hariwo, Corp., asserted that she never received the notice until after her counsel filed and subsequently received a response to a Freedom of Information Law (FOIL) request made by her representative on June 21, 2021.

7. On September 15, 2022, the Division of Tax Appeals, issued a notice of intent to dismiss petition, on the basis that the petition was not timely filed with the Division of Tax Appeals.

8. In response to the notice of intent to dismiss petition, and to show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) an affirmation, dated November 22, 2022, of Laura Krzeminski, Esq., the Division's representative; (ii) an affidavit, dated November 8, 2022, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record For Presort Mail – Assessments Receivable” (CMR) postmarked October 15, 2019; (iv) an affidavit, dated November 15, 2022, of Susan Ramundo, a manager in the Division's mail room; (v) a copy of the notice mailed to petitioner with the

associated mailing cover sheets; (vi) a copy of the BCMS conference request with the tax warrant attached thereto; (vii) a copy of the conciliation order; and (viii) a copy of five of petitioner's New York State tax preparer and facilitator enrollment forms dated September 17, 2015, October 2, 2015, October 20, 2015, December 11, 2017, and December 13, 2017, respectively (*see* finding of fact 2).

9. Laura Krzeminski, an attorney in the Office of Counsel of the Division, asserts in her affirmation that petitioner's Commodity Cir Ste 4, Orlando, Florida, mailing address listed in petitioner's New York State tax preparer and facilitator enrollment forms corresponds to the address appearing on the notice issued to petitioner and that such is the last known address for petitioner at the time the notice was issued.

10. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier was the Supervisor of Administrative Analysis from July 2019 through August 2022, and has been the Principal Administrative Analyst and the Director of MAPS since August 2022. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case, "20192801700." Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to "10/15/19." In addition, as described by Ms. Denier, generally all

pages of the CMR are banded together when delivered into the possession of the United States Postal Service (USPS) and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

11. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

12. The CMR in the present matter consists of 19 pages and lists 204 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Denier notes that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. Each of the 19 pages of the CMR attached to the Denier affidavit as exhibit "A" contains a USPS postmark of October 15, 2019. On page 19, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 204 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "204," indicating 204 pieces of mail were received by the USPS. There appears to be a postal employee's initials on each page of the 19 pages of the CMR.

13. Page 18 of the CMR indicates that a notice with certified control number 7104 1002 9730 0015 2910, and reference number L-050719755 was mailed to petitioner, “VELAZQUEZ-ADRIANA” at the Commodity Cir Ste 4, Orlando, Florida, 32819-9077 address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

14. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo has been in this position since 2017 and has been employed there since 2012, and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division’s record of receipt by the USPS for the pieces of certified mail listed thereon.

15. According to both the Denier and Ramundo affidavits, a copy of the notice was properly mailed to petitioner on October 15, 2019, as claimed.

16. As noted above, petitioner filed a petition with the Division of Tax Appeals in protest of the notice on April 12, 2022. A copy of petitioner's USPS date-stamped envelope with that date, used for the mailing of the petition, was included with the Division's motion papers. The petition was date stamped as received by the Division of Tax Appeals on April 14, 2022.

17. In response to the notice of intent to dismiss, petitioner provided the following : (i) an affirmation, dated December 1, 2022, of Ariele R. Doolittle, Esq.; (ii) an affidavit, dated November 29, 2022, of petitioner; (iii) an affidavit, dated November 29, 2022, of Eddie Kotler, the owner and operator of TaxZone, Inc., the company petitioner worked for in Florida; (iv) a copy of petitioner's FOIL request dated June 2, 2021; and (v) certain records the Division provided petitioner in response to the FOIL request.

18. Ariele R. Doolittle, petitioner's representative, asserts in her affirmation that the Division issued petitioner a statement of proposed audit changes, dated August 27, 2019, which was correctly addressed to petitioner at her Flower Fields Lane, Orlando, Florida, address. Ms. Doolittle also represents that shortly after the Division mailed the statement of proposed audit changes to petitioner at her Flower Fields Lane, Orlando, Florida, address, the Division issued the relevant notice, but addressed the notice to petitioner at her Commodity Cir Ste 4, Orlando, Florida, address. Ms. Doolittle asserts that after the relevant notice was issued, the Division mailed the tax warrant correctly to petitioner at her Flower Fields Lane, Orlando, Florida, address. In light of the sequence of mailings from the Division to both the Flower Fields Lane and Commodity Cir Ste 4, Orlando addresses, petitioner challenges the appropriateness of the Division's use of the Commodity Cir Ste 4, Orlando, Florida, address for the mailing of the

notice.

CONCLUSIONS OF LAW

A. The standard of review for a notice of intent to dismiss the petition is the same as that for a motion for summary determination (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). A summary determination motion “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

Section 3000.9 (c) of the Tax Appeals Tribunal's Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. Thus, the movant for summary determination “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As the Tribunal noted in *Matter of United Water New York*:

“Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is ‘arguable’ (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

B. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (*see* Tax Law § 1138 [a]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law §

170 [3-a] [a]).¹ It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is on the mailing of the statutory notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. An aspect of proper mailing is that the notice be mailed to petitioner’s last known address. Under Tax Law § 1138, a notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of tax at his or her last known address (*see* Tax Law § 1138 [a] [1]). Tax Law § 1147 requires issuance of a notice of determination under article 28 to the “person for whom it is intended in a postpaid envelope

¹ Here petitioner’s BCMS conference request did not challenge the notice but rather the tax warrant (*see* finding of fact 4).

addressed to such person at the address given in the last return filed by him pursuant to the provisions of [article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable” (Tax Law § 1147 [a] [1]).

The “last known address” has been defined for federal purposes as the taxpayer’s last permanent address or legal residence known by the Internal Revenue Service (IRS) or the last known temporary address of a definite duration to which the taxpayer has directed the IRS to send all communications (*see Matter of Kallianpur*, Tax Appeals Tribunal, May 29, 2019; *Sicari v Commr.*, 136 F3d 925 (2d Cir 1998); *Matter of Campos-Liz*, Tax Appeals Tribunal, January 12, 2017, citing *Alta Sierra Vista, Inc. v Commr.*, 62 TC 367, 374 [1974]), *affd* 538 F2d 334 [1976]). It is the address at which the IRS reasonably believed the taxpayer wished to be reached (*see Follum v Commr.*, 128 F3d 118 [2d Cir 1997] [the reasonableness of the Commissioner’s belief as to what is the taxpayer’s last known address is to be assessed as of the time of the IRS mailing]).

D. In the case at hand, the Krzeminski affirmation, combined with the Denier and Ramundo affidavits and attachments, establish the Division’s standard mailing procedures and that the notice was mailed to petitioner at her Commodity Cir Ste 4, Orlando, Florida, address. These affirmations and affidavits, and their related exhibits, however, do not sufficiently demonstrate that the Commodity Cir Ste 4, Orlando, Florida, address was petitioner’s “last known address” at the time of the notice was mailed. The Division relies on petitioner’s New York State tax preparer and facilitator enrollment form, dated December 13, 2017, to establish petitioner’s “last known address” for the mailing of the notice. However, petitioner denies receipt of the notice and, more importantly, points out that the Division appears to have mailed a statement of proposed audit change to petitioner at her Flower Fields Lane, Orlando, Florida,

